INDEX.

Table of Authorities.

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 30.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ROOSEVELT HUDSON HARRIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc., respectfully moves this Court for permission to file a brief as amicus curiae in support of the United States in the case of the *United States* v. *Roosevelt Hudson Harris,* No. 30, October, 1970 Term. We have been advised by the Clerk of this Court that the original defense attorney in this case cannot be located and that there is some question as to whether he will be continued in the case. We have secured the permission of the Solicitor General of the United States to file and a copy of a letter to this effect has been filed with the clerk. As the defense attorney is unavailable, we are moving the Court directly for permission to file.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE also has such powers as are now or may hereinafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

AELE has appeared in this Court as *Amicus Curiae* in the Cases of *Terry* v. *Ohio,* 392 U. S. 1, and *Hill* v. *California,* No. 730, October 1970 term, re-argued October 21, 1970. We have also appeared as *Amicus Curiae* in the United States Court of Appeals for the Tenth Circuit in *Metros et al.* v. *District Court,* No. 432-70, 1970.

The interest of AELE is to represent the concern of the average citizen with the problems of crime and with police

effectiveness. We seek to articulate to the Court the very real problems that confront law enforcement in this country, in order that the Court may weigh such problems in deciding cases which will have a vital impact on police effectiveness.

As the Report of the President's Commission on Law Enforcement and Administration of Justice (p. 94) has pointed out:

> ". . . many . . . decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs and human rights, *the former must be articulated.* They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation (emphasis added).

The articulation called for by the President's Commission is what we seek to accomplish. Further, as *amicus curiae* we are in a position to give a voice to what we believe are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search.

The instant case is, we believe, a case of extreme significance to the effectiveness of law enforcement as a whole. Search and seizure cases are, so far as the police are concerned, perhaps the most important class of cases this court considers. This Court's prior decisions in the area of confessions *Miranda* v. *Arizona,* 384 U. S. 436; *Orozco* v. *Texas,* 394 U. S. 324 leave no doubts as to the

Court's preference for the use of physical evidence against an accused rather than evidence elicited from the accused himself. Search and seizure is, or course, the means by which the police acquire physical evidence.

The issue presented in the instant case—the interpretation of affidavits for search warrants—is vital to effective search and seizure procedures. In addition, this is the first significant case dealing with search warrants that this Court has agreed to review since *Chimel* v. *California*, 395 U. S. 752, greatly expanded the requirement of the use of search warrants by the police. We have empirical data to present to the Court as to the impact of *Chimel* on law enforcement which we believe will aid the Court in this case, and as in our *amicus curiae* briefs in *Terry* v. *Ohio, supra,* and *Hill* v. *California, supra,* we will present to the Court the police position in a practical rather than a theoretical context.

Thus, because of our concern to represent the law abiding segment of society through support for *proper, non-abusive* law enforcement—and because of the significance of the instant case—we believe that we have a real interest in appearing as *amicus curiae.*

ARGUMENT.

1. The Importance of This Case to the Police.

This case has a singular importance for the police of this country because it is the first significant search warrant case that this court has agreed to review since its decision in *Chimel* v. *California*, 395 U. S. 752 (June, 1969). As this Court is aware, *Chimel* drastically changed the law of search and seizure insofar as searches of premises are concerned. Whereas prior to *Chimel* the general rule was that *all* of a given premises under an arrestee's control could be lawfully searched incident to his arrest on such premises (*United States* v. *Rabinowitz*, 339 U. S. 56), now the scope of such searches must be confined to the "immediate area" of the arrestee. The net effect of the *Chimel* decision on working police officers is that they must procure search warrants in by far the greatest majority of cases. The greatly expanded search warrant system mandated by *Chimel* gives to this case a special significance simply because it *is* a search warrant case.[1]

We do not wish to belabor the point that *Chimel* has had a startling effect on police procedures;[2] however, AELE

1. Mr. Justice Harlan noted this point in his concurring opinion in *Chimel*. After pointing out that *Mapp* v. *Ohio*, 367 U. S. 643, and *Ker* v. *California*, 374 U. S. 23, require that changes in Fourth Amendment law enunciated by this court must be followed by state officers, nation-wide, he stated:

> We simply do not know the extent to which cities and towns across the nation are prepared to administer the greatly expanded warrant system which will be required by to-day's decision. . . . (395 U. S. 752 at 769).

2. Examples of some of the other problems raised for the police by *Chimel* were presented to this Court in the amicus curiae brief filed by Americans for Effective Law Enforcement et al. in the case of *Hill* v. *California*, No. 730 on reargument before this Court October term 1970.

would like to offer to the Court two brief examples of the impact of that case on local police departments.

1. In September of 1969 the Los Angeles Police Department conducted a study of the effects of *Chimel* in that city. Search and seizure cases in March of 1969, three months prior to the *Chimel* decision, were reviewed. This study indicated that there were 436 incidents in March that would have required different police procedures had *Chimel* then been in effect. Projected on an annual basis this figure would approximate 5,200 such incidents in Los Angeles alone. The same study estimated that the *Chimel* decision would cost the Los Angeles Police Department an additional 86,000 man hours annually at a monetary cost of $464,000 per year.[3]

2. The following figures from the files of the Denver District Court show the number of search warrants secured by the Denver Police during six month periods:

January-June 1969 (just prior to *Chimel*)	162
June-December 1969 (just after *Chimel*)	259
January-June 1970	383

The increased search warrant activity after *Chimel* is obvious, in the first six month period of 1970 the number of search warrants more than doubled over the same period a year before.

These figures from Los Angeles and Denver clearly portray the extent to which *Chimel* has increased the necessity for police use of search warrants. We urge the Court to consider the instant case, which deals with the question

3. This study is contained in a Los Angeles Police Department report dated September 24, 1969 from Captain W. G. Brown, Commander, Management Services Division, to Assistant Chief Daryl F. Gates, Director, Administrative Services; Subject: Man Hour Cost Study re: *Chimel* decision. Copies of this report were lodged with this Court on October 21, 1970 by Mr. Ronald M. George, Assistant Attorney General of the State of California when he re-argued *Hill* v. *California* (No. 730 October 1970 Term), before the Court.

of interpretation of search warrants, in the context of *Chimel's* command to the police that warrants must be used in the vast majority of cases.

2. The Question of Standards for Interpretation of Search Warrants: Common Sense and Realistic versus Hypertechnical and Rigid.

The instant case deals with the basic question of how search warrants are to be interpreted by the lower courts.[4] As was pointed out above, the importance of the answer to this question has been magnified by *Chimel's* requirement of greatly increased use of search warrants by the police. The instant case presents the interpretation question in sharp focus. The facts are not in dispute and have been set out fully by the United States in its brief, at pages 3 through 6, therefore only the briefest re-capitulation is needed here.

The question presented involves the interpretation of an affidavit for a search warrant, the execution of which resulted in the discovery of illicit liquor. Respondent's motion to suppress the search warrant as insufficient to establish probable cause was denied by the trial court[5] and he was convicted of possessing non-taxpaid liquor. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that the affidavit for search warrant was insufficient to establish probable cause, 412 F. 2d 796. The Government petitioned for a writ of certiorari which was granted by this Court on February 24, 1970.

The affidavit for search warrant in question, filed by a federal Alcohol and Tobacco Tax Special Investigator, was

4. For the sake of brevity we will use the term "search warrant" to apply to the warrant itself as well as the underlying affidavit.

5. United States District Court for the Eastern District of Kentucky. The testimony in the motion to suppress may be found in the appendix to the brief of the United States in the instant case.

based on respondent Harris' reputation with the affiant for being a moonshine trafficker; information received by the affiant about H[illegible]s' activities; location of a stash of illicit liquor on premises under Harris' control on an earlier date; and on a sworn statement from an unnamed informant who had recently purchased liquor from Harris. This sworn statement described Harris' whiskey selling operation in detail and the affiant stated that he had interviewed the informant and found the informant to be a prudent person.[6]

The United States in its brief, pages 8 through 16, argues that the affidavit for search warrant in this case did, in fact, establish probable cause when viewed in a common sense manner, and the United States further contends that the lower court interpreted the affidavit in a "rigid, technical manner that loses sight of the relevant inquiry" (Br. page 10), AELE will not reiterate these arguments except to express our complete agreement with and support for the Government's position. We will turn, rather, to the more fundamental question, vital to law enforcement, of the standards that should be applied in the interpretation of search warrants by reviewing courts. We submit that this case presents this Court with an opportunity to lay down the basic interpretative rule for lower courts to follow and that such a rule should be characterized by common sense and realism.

Surely the prior pronouncements of this Court make it clear that a common sense approach is preferable. *United States* v. *Ventresca*, 380 U. S. 102, stands firmly for the principle that:

> . . . affidavits for search warrants . . . must be tested by and interpreted by magistrates and courts in a common sense and realistic fashion (p. 108).

6. The affidavit is reprinted in the appendix to the brief of the United States in the instant case.

This principle was most recently reaffirmed by this Court in *Spinelli* v. *United States*, 393 U. S. 410 (1969). In that case an affidavit for search warrant was found insufficient, but the *principle* of common sense interpretation of *Ventresca, supra*, was explicity affirmed. 393 U. S. 410 at 419.

Further, in the related area of probable cause to arrest,[7] this Court has never retreated from the flexible, common sense approach taken in *Draper* v. *United States*, 358 U. S. 307, in which detailed information provided by an informant, corroborated by the officers' observations was held sufficient to justify an arrest and search (See also *United States* v. *Mitchell*, CA 8, 425 F. 2d 1353 (4/14/70), in which then Judge Blackmun applied *Draper* to sustain an arrest and search).

The common sense approach to search warrants can be found emphasized in the Federal Circuits time and again. For example, the Second Circuit in *United States* v. *Dunnings*, 425 F. 2d 836 (11/17/69):

> But here the admonition in *United States* v. *Ventresca*, 380 U. S. 102, 108; (1965), against reading such affidavits with undue technicality comes into play (p. 839).

Similarly the Third Circuit in *Kislin* v. *New Jersey*, 429 F. 2d 950, (7/9/70) sustained a "borderline" search warrant and applied a realistic approach emphasizing the often-announced rule of the preference for search warrants.

The Eighth Circuit in *McCreary* v. *Sigler*, 406 F. 2d 1264 cert. den. 396 U. S. 829 (2/18/69) summed up the interpretative rule:

> In dealing with the sufficiency of affidavits (1) only a probability of criminal conduct need be shown, (2) standards less rigorous than rules of evidence determine sufficiency, (3) common sense controls, and (4) great deference should be shown by the courts to a magistrates determination of probable cause (p. 1268).

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7. In *Spinelli, supra*, Mr. Justice Harlan pointed out that the analysis concerning probable cause to arrest and probable cause for a search warrant is basically the same. 393 U. S. 410, ft. 5.

Thus the weight of judicial authority is clearly on the side of realistic review of search warrants. In addition, we urge the Court to consider the question from the point of view of the police officers themselves. In *Gonzales* v. *Beto*, 425 F. 2d 963 (5/6/70) the United States Court of Appeals for the Fifth Circuit sustained two search warrants against the restrictive interpretation imposed by the district courts upon the supporting affidavits. In so doing, the Court gave a surprisingly accurate description of the practical side of police work in securing warrants:

> It is not the intent of the *Aguilar* and *Spinelli* decisions to make it difficult for a policeman to get a warrant if in fact he has probable cause. On the contrary, the cases contemplate that an affiant with some basic understanding of the law can get a warrant if he simply sits down and explains why (p. 970).

Thus, the average police officer, in attempting to draft an affidavit for search warrant, is expected to "simply sit down and explain why" he believes he has probable cause. Mr. Justice Clark has characterized the policeman as ". . . anxious to obey the rules that circumscribe his conduct [in the search and seizure area] . . ." *Chapman* v. *United States*, 316 U. S. 610 at 622 (dissenting opinion). This characterization is accurate; the policeman *does* want to obey the rules, but the policeman is not a lawyer in most instances, and as was pointed out in *United States* v. *Ventresca, supra:*

> Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. 380 U. S. 102 at 108.

The instant case is an excellent example of this principle. The Alcohol Tax Investigator felt that he had probable cause and he attempted to explain why. The affidavit in the instant case is no literary masterpiece nor is it a stunning piece of legal drafting—but it is not supposed to be.

We submit, and we urge the Court to hold, that when it is viewed in a common sense and realistic fashion, the affidavit for search warrant in the instant case tells a coherent story which would cause a reasonable man to believe that whiskey was located on Roosevelt Harris' property; that is, the affidavit establishes probable cause.

We state here, emphatically, that we do not contend that just because an officer takes the time to draft an affidavit appellate courts should "rubber stamp" his action. Probable cause remains the standard for search warrants. Our point is based on the *manner* of interpreting the warrant to ascertain if it states probable cause. We agree with the government that in this case the lower court literally picked the affidavit to pieces with a rigidity of interpretation that was not warranted. We urge this Court to reverse this interpretation by the lower court and to uphold the affidavit as establishing probable cause. In so doing the Court would be affirming the vital principle that common sense, flexible, realistic, interpretation of search warrants is, and should be, the rule.

3. The Informant Issue: The "Good Citizen" or One Time Informant.

There is a final isue of critical importance to the police in this case, namely: whether they may lawfully act on information from an informant whose credibility has been established by means other than "prior reliability". The United States has dealt with this issue in its brief at pages 13 and 14. The United States argues that there are circumstances in which a magistrate should be able to issue a warrant on the basis of information from a person who has never given information to the police before and who does not want his identity revealed, usually from motives of fear for the safety of himself or his family. We agree with this contention.

McCray v. *Illinois*, 386 U. S. 300, makes it clear that an informant's reliability can be shown by the fact that he has given information in the past that has proved to be reliable; but this should not constitute the *only* basis for establishing reliability. The United States (Br. page 14) sums up this point:

> Law enforcement officers ought to be able to act on information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear that he found the informer credible, and when the information is consistent with other facts known to law enforcement officers concerning the subject's reputation and activities.

This is basically a "rule of reason" in search warrant interpretation such as is urged upon this Court in the second section of our argument. Our purpose in this section is to present to the Court some practical situations[8] often encountered by the police in which the "one time" or "good citizen" informant clearly falls within the qualifications for reliability referred to in the Government's brief:

(a) *Actual case*—Charlotte, N. C. Police Department.

A grocery store had been burglarized and the cash register stolen. The informant, an 18 year old employee of the store, who had never furnished information to the police before, saw the stolen cash register in a house in the neighborhood and heard the occupant boast of having stolen it. The informant did not wish to be identified as he was afraid of reprisals.

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8. The first example is an actual case now pending in North Carolina which was sent to the writer by Mr. G. Patrick Hunter, Police Attorney for the Charlotte, North Carolina Police Department. The other examples are "hypothetical" in that no one particular case is described; however, they are common occurrences in police work and are based on 10 years of personal police experience of the writer of this brief (including three years as a Police Legal Advisor) and discussions of this matter with other police officials. The "hypothetical" situations are not far-fetched, but rather are everyday situations that have arisen and could arise in any police jurisdiction.

A search warrant issued in this case. In order to establish the reliability of the informant the police swore to the following facts:

(1) the police interviewed the informant and were of the opinion that he was reliable, that he had observed the cash register in the suspect's home and that he could identify it;

(2) the police interviewed the informant's employer and his neighbors who stated that he was a reliable, accurate and honest individual;

(3) the informant had no police record.

When the warrant was executed the cash register was found.

(b) *"One-time" Informant Situations:*

Maids—In many cases maids in motels and hotels will, in the course of their cleaning duties, come across stolen property or contraband. They often report these findings to the police but in many cases they do not wish to be identified, again for fear of reprisals.

Landlords and custodians—These individuals are somewhat analogous to the maids in that their duties take them lawfully into other premises, yet they may never have given information to the police before. On many occasions the police receive reports from such individuals that stolen property, narcotics or weapons have been seen by them in apartments, rooms, etc. Again, the incentive not to be identified is present, yet there may be every reason to believe that they are telling the truth.

Parents—Parents, these days, are particularly concerned with the use of narcotics by their children and are generally on the alert for conversations about drugs that their children may engage in. In a Colorado situation, a mother overheard her son and a friend discussing in detail plans for a "pot party" at the friend's house that night. She went to the police with this information; yet, as she had not given information before,

she did not fit the classic "reliable informant" pattern. Her "credibility", it would surely seem, would be established under these facts.

These are only a few examples of situations in which the "one time" or "good citizen" informant furnishes information to the police that has all of the earmarks of being worthy of belief. Further, in these cases, the informant has no reason to lie. We submit that, where the officers can swear that they believe such persons to be credible, where there is specific and detailed information,[9] where other facts known to the officers are consistent with the information, and where the informant has sworn to the truth of the information—this "totality" of circumstances, viewed in a common sense manner, should surely constitute probable cause for a search warrant. Such is the situation in the instant case and we again urge the Court to uphold the search warrant in that case.

Conclusion.

The interest of Americans for Effective Law Enforcement in filing this brief as *amicus curiae* has been to speak out for effective law enforcement in a case which we feel is of major importance. As the first search warrant case since *Chimel* v. *California, supra,* was decided the instant case is important; as a case in which interpretative rules for search warrants it is important; and, on the "good citizen" or "one time" informant issue it is important.

We urge the Court to reverse the Court of Appeals for the Sixth Circuit and to sustain the validity of the affidavit

9. In a recent case dealing with automobile searches, *Chambers* v. *Maroney,* ..... U. S. ....., 90 S. Ct. 1975 (1970), this court sustained an arrest and search based on the detailed description of eyewitnesses even though the witnesses had never given information to the police before. Is not a motel maid who sees contraband in plain view, in a room where she has a right to be, an "eyewitness" to the crime of possession of that contraband?

for search warrant in the instant case. We submit that this affidavit *does* in fact establish probable cause when viewed in the common sense realistic manner that this Court and lower courts have often stated should be the interpretative rule.

Respectfully submitted,

FRANK G. CARRINGTON JR., ESQ.,
228 North LaSalle Street,
Chicago, Illinois 60601,
Executive Director,
Americans for Effective
Law Enforcement, Inc.

ALAN S. GANZ, ESQ.,
104 South Michigan Avenue,
Chicago, Illinois 60603,
Secretary-Treasurer,
Americans for Effective
Law Enforcement, Inc.